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No. 87-1685

**In the Supreme Court of the
United States**

October Term, 1987

SHELL OIL COMPANY,

Petitioner,

v.

CITY OF SANTA MONICA, California,

Respondent.

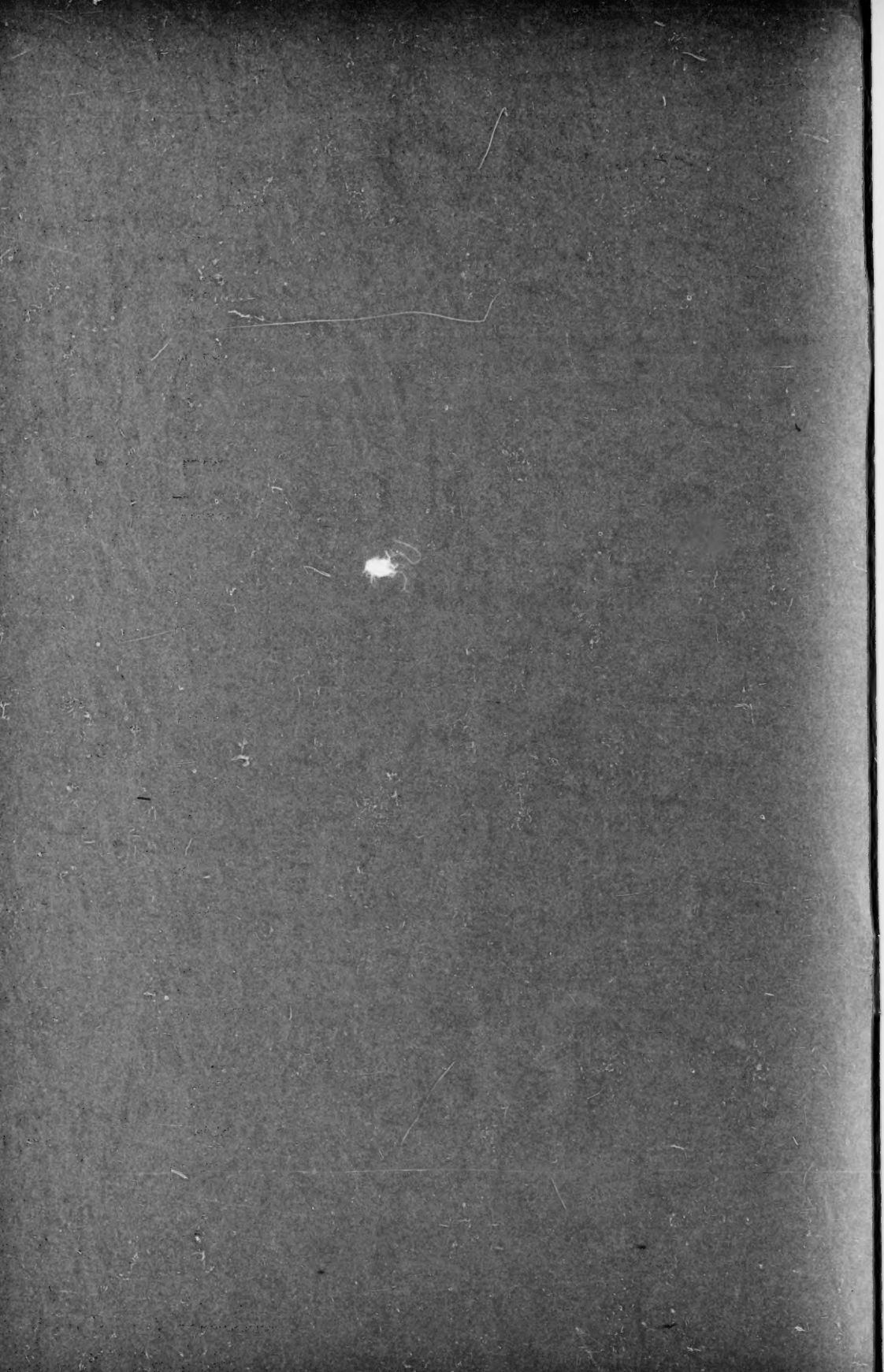
ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

**BRIEF IN OPPOSITION TO
PETITION FOR WRIT OF CERTIORARI**

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QUESTIONS PRESENTED

1. Does the Commerce Clause prohibit municipal lease fees for exclusive proprietary use of the subsurface of city streets from being based on a reasonable percentage of land value?
2. Does the Commerce Clause require that a lease fee charged to a company engaged in domestic and interstate commerce in crude oil be equivalent to franchise fees charged to regulated public utilities engaged in domestic and interstate commerce in other commodities?



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Respondent, City of Santa Monica, respectfully submits this Brief in Opposition to the Petition for Writ of Certiorari filed by Shell Oil Company.

STATEMENT OF THE CASE

1. Statement Of Facts

Petitioner, Shell Oil Company, owns and operates a proprietary 10-inch diameter crude oil pipeline connecting gathering fields in Ventura, California, with a Shell refinery in Wilmington, California ("Ventura

pipeline"). App. A-2, B-2.¹ The pipeline lies wholly within the State. *Id.*; CR 96:19. It is one of several viable means of transporting crude oil between these two points. App. A-10, B-4-5, E-3.

Prior to installing the line in 1941, Shell's predecessor² obtained leases or grants of easement from public and private entities along a preferred route. App. A-2, B-1-2. Santa Monica awarded a 40-year lease, denominated a franchise, for that portion lying beneath City streets ("Santa Monica segment"), consisting of approximately 4 miles of the 82 mile route. *Id.* The City does not regulate subsurface pipeline uses on private property. App. A-14 n.8. The lease contained no renewal provision and expired by its own terms in 1981. App. A-2.

Most of the crude oil carried in the Ventura pipeline is produced by Shell and other oil companies in gathering fields in the Ventura area. App. E-3. The line also carries crude oil produced on the Outer Continental Shelf (OCS), off the shore of Ventura, which Shell purchases through the use of "exchange agreements." App. A-3. All of Shell's Ventura drilling operations are onshore; Shell acquires title to the OCS-produced oil at the point it enters Shell's onshore pipeline in Ventura. App. A-3, CR 80:43-44, 78:92-98. At the end of the line in Wilmington, Shell "exchanges back" an amount of crude approximately equal to that purchased by exchange in Ventura. Technically, Shell has title to all crude passing

¹Appendix (App.) citations are to the Appendix to Shell Oil Company's Petition for Writ of Certiorari.

²For clarity, both Shell Oil Co. and its predecessor will be referred to as Shell.

through the line. App. A-3, CR 78:92-95.³

Santa Monica is bordered on the west by the Pacific Ocean, and on its other three sides by the City of Los Angeles. The Santa Monica segment runs principally north to south, just inside the City's eastern boundary. App. A-2. Because of its location in a dense urban area in proximity to Pacific Ocean beaches, the line passes beneath some of the most valuable land in North America. The line approaches within 50 feet of a city water well, rendering that water supply unusable pursuant to state law. CR 78:3. The Ventura pipe-line has ruptured five times since 1970. App. E-3.

Shell concedes the availability of other means to transport its crude oil from Ventura to Wilmington. Cert. Pet. at 3-4. Common carrier and proprietary crude oil pipelines are located in neighboring Los Angeles which are presumably available for Shell's use. App. B-5. Alternative lines could be laid in Los Angeles or along the coastal strip, which is under the control of the State Lands Commission. See *Western Oil and Gas Association v. Cory*, 726 F.2d 1340 (9th Cir. 1984), *aff'd per curiam by an equally divided court*, 471 U.S. 81 (1985). Shell's preference for the existing Santa Monica segment is its profitability. Cert. Pet. at 4.

When the franchise expired in 1981, the parties undertook negotiations for a new franchise. App. A-3, B-2. Shell proposed to pay approximately \$8,500 annually. App. A-3. The City hired an independent appraiser who determined the fair rental value of the exclusive subsurface easement. He recommended a

³Without these title transfers, the Ventura line might be subject to Cal. Public Utilities Code Section 216(b) (regulation of common carrier pipelines).

formula using 50% of abutting land values, capitalized at a rate of 12.5%. App. A-3. Based on a five-foot wide strip for the length of the Santa Monica segment, an annual rent of \$237,000 was proposed. App. A-3; CR 78:80.⁴ Neither the amount nor method of calculation has ever been controverted by Shell since it maintains that it need not pay fair value.

Shell rejected the City's proposal, protesting both the amount of the fee and the inclusion of proposed safety terms.⁵ It terminated negotiations by filing this lawsuit. App. A-5. Shell and the City entered into an interim operating agreement which has allowed Shell to continue operating the line in Santa Monica. App. A-4.

2. Proceedings Below

Shell's Complaint asserted that Santa Monica was required under the Commerce Clause to grant Shell a subsurface lease at a rental not to exceed the City's actual cost of services provided, plus compensation for the reasonable value of "rights surrendered" by the City. App. A-5. The City responded that the Commerce Clause, in its dormant state, could not be invoked to compel affirmative action, such as the mandatory award of lease rights. Furthermore, the proposed lease fee was exempt from Commerce Clause scrutiny because the City was acting as a market participant. App. B-3. Finally, the fee did not discriminate against, nor constitute an

⁴That figure was calculated in 1981. Since land values in Santa Monica have nearly doubled during the seven years of this litigation, the current rental value would be correspondingly higher.

⁵Because of concerns regarding the pipeline's advanced age, its proximity to densely populated areas, and its physical placement, the City hired an independent consultant to conduct a safety study of the line. App. A-3-4. His safety recommendations were included in the proposed lease offered by the City. App. A-4.

undue burden on, interstate commerce. App. B-12, B-13.⁶

On cross-motions for summary judgment, the District Court found the fee to be constitutionally permissible on all grounds urged by the City. The court held that the City acted as a market participant in negotiating a lease with Shell. App. B-8. It found the decision in *Cory* distinguishable because the City did not hold a monopoly position over transportation routes, as did the State in *Cory*. App. B-4-8. The Court further held that the proposed lease satisfied Commerce Clause concerns. Unlike the fee challenged in *Cory*, which included a volumetric throughput charge, the City's proposed fee was not linked to the volume of goods flowing in commerce. Instead, the rental rate was based solely on the area of land exclusively occupied by Shell's pipeline. App. B-8. Thus, the Court found the fee was more like a tax than a user fee and did not burden commerce. App. B-13. Shell filed a timely appeal.

The Ninth Circuit affirmed on the theory that the City's proposed lease fee did not violate the Commerce Clause, but reversed the lower court's ruling on the market participant doctrine. The court read its prior decision in *Cory* to create an exception for lands "held in a sovereign capacity that are recognized transportation corridors for commerce." App. A-10. Although the Court of Appeals agreed with the District Court that

⁶Additionally, Shell claimed, and the City denied, preemption of safety terms based on Federal and California Safety Acts. Two other issues were also joined: (1) whether the City's proposed fee had extraterritorial effects, thereby violating provisions of the California Constitution; and (2) whether the City's proposed fee violated the Equal Protection Clause. None of these issues are raised in the Petition for Writ of Certiorari.

“the present case is distinguishable from *Cory*,” *id.*, it nonetheless found that case controlling.⁷

The Court of Appeals analyzed the lease rent as a user fee, rather than a general revenue tax, because it was not a City-wide charge imposed on oil pipeline operators regardless of whether the pipes traveled under public or privately owned land. App. A-14 n.8. Nonetheless, the Court noted that the charge differed from traditional “user fees” because it was not assessed on goods traveling through interstate commerce. Further, it did not discriminate against interstate commerce, or adversely affect commerce by subjecting it to inconsistent regulation, the evils with which the Commerce Clause was concerned. App. A-12, A-15. Because Santa Monica’s fee was based on an even-handed formula and not graduated by the amount of business done, it was not “manifestly disproportionate” to the services rendered. App. A-15.

⁷The City has filed a Cross-Petition for Writ of Certiorari contemporaneously with this Brief, seeking review of the Court of Appeals’ market participant ruling in the event Shell’s petition is granted.

REASONS FOR DENYING THE WRIT

I

THE NINTH CIRCUIT DECISION IS IN HARMONY WITH DECISIONS OF THIS COURT AND LOWER COURTS REGARDING THE CONSTITUTIONALITY OF USER FEES

The Ninth Circuit's decision that Santa Monica's proposed rental fee does not offend the Commerce Clause is consistent with precedent regarding the constitutionality of both general revenue taxes and charges designated as "user fees." The Court of Appeals ruled that the proposed fee for Shell's lease was a "user fee," but as such satisfied the test articulated in *Evansville-Vanderburgh Airport Authority District v. Delta Airlines, Inc.*, 405 U.S. 707 (1972). That test was recently reaffirmed by this Court in *American Trucking Associations, Inc. v. Scheiner*, 483 U.S. —, 107 S. Ct. 2829 (1987).

The Court of Appeals recognized that the Commerce Clause is primarily concerned with statutes that either discriminate against interstate commerce or adversely affect it by subjecting it to inconsistent regulation. App. A-12. As the cases illustrate, when a fee is levied on items of commerce passing through a jurisdiction, there is always the possibility that a similar fee may be assessed by other jurisdictions. *See Scheiner*, 107 S. Ct. at 2840. Therefore, burdens may fall inequitably on interstate commerce, giving purely local commerce, that is not subject to such cumulative charges, a competitive advantage.⁸

That was the basis for this Court's ruling in *Scheiner*. It was also the basis for the ruling in *Cory*, which involved

⁸The issue of whether there is any "local" commerce in this case enjoying a competitive advantage is discussed in Section II, *infra*.

two types of fees. Those fees that were assessed on commerce itself, i.e., charges based on the volume of oil passing through the pipeline, were struck down. A rental fee based on land value, however, was not challenged. 726 F.2d at 1343-44. *See also Evansville-Vanderburgh Airport*, 405 U.S. at 718 (distinguishing between a tax on articles in commerce—passengers, and rent for fixed business uses).

In *Scheiner*, this Court found the state “marker fee” and “axle tax” charges assessed on trucks passing through the state to be invalid because they did “not vary directly with miles traveled or with some other proxy for value obtained from the State,” and because a charge for the same service “can be imposed by other States.” 107 S. Ct. at 2844. Fees assessed on commerce itself, therefore, must fairly approximate the cost or value of the use within the taxing jurisdiction so that the burden falls approximately equally on commerce passing through as it does on purely local commerce.

Shell’s assertion that the Ninth Circuit’s user fee analysis conflicts with precedent would be arguably apposite if the rental fee were dependent upon the volume of commerce passing through Santa Monica. *See Cory*, 726 F.2d at 1343-45.⁹ It is this element which limits user fees to “a fair, if imperfect, approximation of the use of facilities for whose benefit they are imposed.” *Evansville-Vanderburgh Airport*, 405 U.S. at 717. Shell applies the proportionality requirement for fees on goods in transit to the very different context of fees based on permanent presence of an activity within the jurisdiction. Where the activity is exclusive occupation of *land*, and

⁹Unlike *Cory*, the increase in volume of crude transported through the line reported by Shell (Cert. Pet. at 3) has had no effect on the City’s proposed lease fee.

the fee is fixed by the amount of land used (rather than volume of goods moving in commerce), the requirement that the fee be reasonably related to the "use of facilities" is satisfied.

Even-handed charges based on "a relevant measure of actual road use," *Scheiner*, 107 S. Ct. at 2844, are valid. As recognized by the courts below, the "relevant measure" here is the square footage of land exclusively occupied by Shell. The *Scheiner* test is thus satisfied by a rental fee calculated according to a "reasonable percentage of the appraised value of the land abutting the pipeline within the City," App. A-15, or some other land based method. Neither *Scheiner* nor *Evansville-Vanderburgh Airport* limit rental fees to cost recovery. "The amount of the charges and the method of collection are primarily for determination by the State itself." *Evansville-Vanderburgh Airport*, 405 U.S. at 712-13 (upholding neutral \$1 per passenger-emplanning fee, half of which went to municipal treasuries). The "fair approximation" requirement, far from being a cost benefit analysis, assures that charges are levied for activity in the state and not for the privilege of moving commerce through the state. See *Scheiner*, 107 S. Ct. at 2845-46.

Where, as here, the charge is not graduated by the amount of commerce, the user fee analysis becomes similar to that applied in *Complete Auto Transit v. Brady*, 430 U.S. 274 (1977), and *Commonwealth Edison Co. v. Montana*, 453 U.S. 609 (1981), namely that the measure of the tax be reasonably related to the extent of the taxpayer's contact with the taxing jurisdiction. Applying that analysis, the focus is again on the *measure* of the fee being *reasonably related* to the pipeline's contact with the City. Since the measure of the lease fee is precisely linked to the amount of City property

being appropriated to exclusive use by Shell, the fee would also be upheld under the test applicable to general revenue taxes. Thus, the Court of Appeals' conclusion that the valuation was not "manifestly disproportionate to the services rendered," App. A-15, is not in conflict with precedent regarding the constitutionality of either user fees or general revenue taxes.

Finally, Shell attempts to create a conflict between the Ninth Circuit's decision and the decision of the Eleventh Circuit in *Arrow Airways, Inc. v. Dade County*, 749 F.2d 1489 (11th Cir. 1985). Shell reads *Arrow* to have required fees charged to airport tenants to be equal to or less than 80 percent of market level for similar property surrounding the airport for it to be reasonable under the Commerce Clause. Rather, *Arrow* merely upheld, as not being "clearly erroneous," a lower court ruling that the charges created no burden on interstate commerce. 749 F.2d at 1492. The lower court had made findings of fact which included that the airport rents charged were "below comparable level rents." That finding was not explained, nor stated to be necessary or sufficient for the ruling. The conflict with the instant case is imagined, not real.

II

THE COURT OF APPEALS' DECISION THAT SANTA MONICA DOES NOT DISCRIMINATE AGAINST INTERSTATE COMMERCE RAISES NO IMPORTANT UNRESOLVED CONSTITU- TIONAL ISSUES

Shell is the only proprietary subsurface lessee in Santa Monica. App. A-12; CR 78:78-79. The Ventura pipeline is the only oil pipeline of any kind in the City. *Id.* Because the City does not favor domestically produced or consumed crude oil, or treat local oil pipelines

preferentially, the Court of Appeals held that Santa Monica does not discriminate against interstate commerce.

Shell argues, however, that Santa Monica discriminates against interstate commerce by charging a different fee to Shell than it does to two regulated public utilities. Shell believes that this raises an important and unresolved constitutional question under the Commerce Clause because it should make no difference whether the "local" commerce which is being compared to the "interstate" commerce involves a different commodity. Cert. Pet. at 19. This is an equal protection claim, which Shell asserted below, a theory which it has omitted from its Petition. Shell apparently recognizes that the equal protection analysis only invokes rational basis review (since Shell is not a member of a protected class and the issue does not involve a fundamental right), and that this Court, as did the Ninth Circuit, would find numerous rationally based distinctions justifying the disparate treatment.¹⁰ Therefore, Shell now relies solely on the Commerce Clause, hoping in the process to benefit from the closer scrutiny given to claims of "discrimination" against interstate commerce under that clause.

The analysis of discrimination differs under the two clauses. The lower courts recognized that Shell's interstate or "local" character was totally irrelevant to the measure of the lease fee. As the Court of Appeals

¹⁰The Court of Appeals noted that the public utility franchises are different from Shell's lease in important respects: public utilities provide a public benefit that Shell does not; the franchises create different types of potential City liability; and the utility franchises were not shown to have been negotiated under similar conditions as the Shell lease. App. A-13.

emphasized, the best that Shell could argue was that the burden of the fee fell on a non-local company, but that this fact did nothing to establish discrimination against interstate commerce. App. A-13. *See Commonwealth Edison*, 453 U.S. at 618 (irrelevant that fee “burden is borne primarily by out-of-state consumers”); *Exxon v. Maryland*, 437 U.S. 117 (1978) (burden falling entirely on out-of-state producers does not establish discrimination).

Shell’s passing reference to *Scheiner*, and *Maryland v. Louisiana*, 451 U.S. 725 (1981) does not aid its cause. Each involved differential taxes on the same type of interstate activity. In *Scheiner*, interstate trucks registered in Pennsylvania received tax credits not available to trucks registered elsewhere. In *Maryland v. Louisiana*, natural gas produced on the Outer Continental Shelf was subject to Louisiana’s “First-Use Tax” when passing through the state, yet domestic users and local uses of the gas were exempt or received offsetting credits against other taxes. In both cases, the only differentiating factor was whether the user or provider was in-state. Here, Shell has not shown that the source or destination of its oil has any relevance to the City’s lease fee arrangements.

Moreover, Shell has not established that the two “preferred” public utilities are “local” or intrastate in any manner meaningful to Commerce Clause analysis, nor that Shell’s interstate character is any different than theirs. By Shell’s own analysis, the commodities carried by all three lessees (natural gas, electricity, and crude oil) are in interstate commerce.¹¹ It is true that the public utilities serve City residents, as well as others.

¹¹ See Appellant’s Opening Brief in the Ninth Circuit, p. 6 n.1.

Presumably, Shell also provides its products to local inhabitants. Shell's particular admixture of inter/intrastate commerce may pay a higher fee than some other mix, but that does not show discrimination against interstate commerce.¹²

III

THE NINTH CIRCUIT DECISION WAS AMPLY SUPPORTED BY THE RECORD

Shell asserts that the Court of Appeals improperly resolved a material issue of fact in this case regarding the fair market value of the right-of-way under City streets. Cert. Pet. at 20. Shell is mistaken in its interpretation of the Ninth Circuit's decision. As discussed in Section I, the court was not passing on the reasonableness of the *amount* of the fee, but rather the reasonableness of the *relationship* between the measure of the fee and the rights and services given up by the City. The court found that as a matter of law, the valuation was not "manifestly disproportionate to the services rendered." App. A-15.

The Court of Appeals noted that the method of valuation, a "reasonable percentage of the appraised value of land abutting the pipeline" was in the record, and not disputed by Shell. App. A-15. Thus, the record

¹²Shell's attempted comparison of its private proprietary line with those of public utilities is particularly striking for a different and unintended reason. If Shell were operating a common carrier pipeline, it would have eminent domain rights like other utilities under state law. California Public Utilities Code Section 615. But then, Shell would have to pay *fair value* for the land appropriated. Shell asserts here that the Commerce Clause endows its private, as opposed to public, use with even greater rights than public utilities—it need pay no more than the value of services rendered by the City.

was sufficient to support the Ninth Circuit's decision; it did not improperly resolve any material factual issue.

CONCLUSION

For the above-stated reasons, the City respectfully requests that the Court deny the Petition for Writ of Certiorari.

Dated: May 9, 1988

Respectfully submitted,

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PROOF OF SERVICE BY MAIL

State of California

SS.

County of Los Angeles

I, the undersigned, say: I am and was at all times herein mentioned, a citizen of the United States and a resident of the County of Los Angeles, over the age of eighteen (18) years and not a party to the within action or proceeding; that my business address is 11333 Iowa Avenue, Los Angeles, California 90025; that on May 9, 1988, I served the within *Brief in Opposition to Petition for Writ of Certiorari* in said action or proceeding by depositing true copies thereof, enclosed in a sealed envelope with postage thereon fully prepaid, in the United States mail at Los Angeles, California, addressed as follows:

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All parties required to be served have been served. I declare under penalty of perjury that the foregoing is true and correct. Executed on May 9, 1988, at Los Angeles, California.

Siri Ved K. Khalsa
(Original signed)